

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**KEVIN COOPER,**

*Petitioner,*

*v.*

**JEANNE WOODFORD, *Warden,***

*Respondent.*

**CAPITAL CASE**

On Appeal from the United States District Court  
for the Central District of California  
Nos. CV 92-0427 H, CV 98-0818 H  
The Honorable MARILYN L. HUFF, Chief U.S. District Judge

**RESPONDENT'S OPPOSITION TO APPLICATION FOR AUTHORIZATION  
TO FILE SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS  
AND REQUEST FOR STAY OF EXECUTION**

BILL LOCKYER  
Attorney General of the State of California

ROBERT R. ANDERSON  
Chief Assistant Attorney General

DANE GILLETTE  
Senior Assistant Attorney General

RONALD MATTHIAS  
Supervising Deputy Attorney General

ADRIANNE S. DENAULT  
Deputy Attorney General

HOLLY D. WILKENS  
Deputy Attorney General  
State Bar No. 88835

110 West A Street, Suite 1100  
San Diego, CA 92101  
P.O. Box 85266  
San Diego, CA 92186-5266  
Telephone: (619) 645-2197  
Fax: (619) 645-2191

*Attorneys for Respondent*

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04-70578

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**JEANNE WOODFORD, *Warden,***

*Respondent.*

**CAPITAL CASE**

**PRELIMINARY STATEMENT**

Cooper requests this Court authorize him to file a successive petition four days before his pending execution so he can raise nine habeas claims. Cooper fails to meet the requirements for authorization as to each of the nine claims. In fact, Cooper's pending application for authorization is so abusive that it even includes claims that are legally and factually indistinguishable from claims this Court has already denied Cooper authorization to file. Cooper's request for a stay of execution should be denied, as he has not demonstrated the necessary showing to be entitled to present a successive habeas petition to

the District Court. His pending application and accompanying request for stay of execution must be denied.

### **STATEMENT OF THE CASE**

Cooper pled guilty to escape from a state prison (Cal. Penal Code § 4530b). Following a jury trial, Cooper was convicted of four counts of first degree murder (Cal. Penal Code § 187(a)) of Franklyn Douglas Ryen, his wife Peggy Ryen, their 10-year-old daughter Jessica Ryen and a neighbor boy, 11-year-old Christopher Hughes. He was also convicted of attempted murder in the first degree (Cal. Penal Code §§ 664/187(a)) of the Ryens' eight-year-old son Joshua Ryen, the severely wounded sole survivor. The jury found the special-circumstance allegation of multiple murders true (Cal. Penal Code § 190.2(a)(3)), as well as the allegation that Cooper intentionally inflicted great bodily injury on the sole survivor, Joshua Ryen (Cal. Penal Code § 12022.7). The jury fixed the penalty as death. On May 15, 1985, the trial court denied Cooper's motion to modify the verdict and sentenced Cooper to death.

On May 6, 1991, the California Supreme Court affirmed the judgment of conviction and sentence of death. *People v. Kevin Cooper*, 53 Cal. 3d 771, 809 P.2d 865, 281 Cal. Rptr. 90 (1991). On June 26, 1991, the California Supreme Court denied Cooper's petition for rehearing and issued its remittitur.



On December 16, 1991, the United States Supreme Court denied Cooper's first petition for writ of certiorari. *Cooper v. California*, 502 U.S. 1016, 112 S. Ct. 664, 116 L. Ed. 2d 755 (1991).

On March 24, 1992, Cooper requested appointment of counsel and a stay of execution from the United States District Court for the Southern District of California. On March 26, 1992, the first in a series of stays of execution was issued by the District Court in case number 92-CV-427.

On August 11, 1994, Cooper filed a petition for writ of habeas corpus in the District Court. On October 13, 1994, the State filed a motion to dismiss the petition for failure to exhaust state remedies. On December 20, 1994, the District Court denied the motion to dismiss and granted Cooper a stay to permit exhaustion of administrative remedies.

On April 4, 1996, Cooper filed his first of seven state petitions for writ of habeas corpus in the California Supreme Court. The California Supreme Court denied the petition on February 19, 1997. *In re Cooper*, case no. S052741.

On March 12, 1997, Cooper filed his first motion to recall the remittitur in the direct appeal in the California Supreme Court. The California Supreme Court denied Cooper's motion on March 26, 1997. *People v. Cooper*, case no. S004687. On August 11, 1994, Cooper filed his first petition for writ of habeas

corpus in the United States District Court for the Southern District of California. *Cooper v. Calderon*, case no. 92-CV-427. On April 12, 1997, Cooper filed an amended petition for writ of habeas corpus in the District Court. On June 20, 1997, Cooper filed a supplemental petition for writ of habeas corpus. On August 25, 1997, following an evidentiary hearing, the District Court denied Cooper's first federal petition for writ of habeas corpus. *Cooper v. Calderon*, case no. 92-CV-427. On September 16, 1997, Cooper filed objections to the entry of judgment in the District Court, and a motion to "clarify certain issues." Cooper's motion was deemed a motion for reconsideration and denied by the District Court on November 7, 1997.

On September 12, 1996, Cooper filed his second state petition for writ of habeas corpus in the California Supreme Court. *In re Cooper*, case no. S064320. On September 30, 1997, Cooper filed his second motion to recall the remittitur in the California Supreme Court. *People v. Cooper*, case no. S004687. The California Supreme Court denied Cooper's petition and motion on October 15, 1997.

On April 26, 1998, during the pendency of his appeal to this Court from the District Court's denial of his first federal habeas petition, Cooper filed a second petition for writ of certiorari in the United States Supreme Court in case

number 97-8837 regarding the District Court's denial of his first federal petition for writ of habeas corpus. On June 26, 1998, the United States Supreme Court denied the petition. *Cooper v. Calderon*, 524 U.S. 963, 118 S. Ct. 2392, 141 L. Ed. 2d 757 (1998).

On April 30, 1998, Cooper filed a second federal petition for writ of habeas corpus in the District Court in case number 98-CV-818. On June 15, 1998, the District Court dismissed Cooper's second federal petition for writ of habeas corpus. *Cooper v. Calderon*, case no. 98-CV-818. On June 25, 1998, Cooper filed a motion in the District Court to alter or amend the judgment dismissing his second federal petition for writ of habeas corpus. On June 30, 1998, the District Court denied Cooper's motion. *Cooper v. Calderon*, case no. 98-CV-818.

On December 23, 1998, Cooper filed his third state petition for writ of habeas corpus in the California Supreme Court. *In re Cooper*, case no. S075527. On March 15, 1999, Cooper filed a supplemental petition for writ of habeas corpus in the California Supreme Court in his third state habeas proceeding. *In re Cooper*, case no. S075527. On March 26, 1999, while his third state habeas petition was still pending, Cooper filed a fourth state habeas corpus petition in the California Supreme Court. *In re Cooper*, case no. S077408. On April 14, 1999, the California Supreme Court denied Cooper's third and fourth state petitions

for writ of habeas corpus. On May 7, 1999, Cooper filed a motion for clarification of rulings regarding his fourth state petition for writ of habeas corpus. The motion was denied on May 12, 1999. *In re Cooper*, case no. S077408.

On July 9, 1999, Cooper filed a third petition for writ of certiorari in the United States Supreme Court in case number 99-5303, challenging the denial of his third state habeas petition by the California Supreme Court. The United States Supreme Court denied the petition on October 4, 1999. *Cooper v. California*, 528 U.S. 897, 120 S. Ct. 229, 145 L. Ed. 2d 192 (1999).

The District Court's denial of Cooper's first federal habeas petition was affirmed by this Court on December 15, 2000. *Cooper v. Calderon*, case no. 97-99030. On July 9, 2001, this Court withdrew its decision and granted Cooper's petition for rehearing and issued a memorandum affirming the denial of Cooper's first federal habeas petition. *Cooper v. Calderon*, 255 F.3d 1104 (9th Cir. 2001), *cert. denied*, 537 U.S. 861 (2002). On August 29, 2001, Cooper filed a petition for rehearing and rehearing en banc. On January 8, 2002, this Court denied the petition. *Cooper v. Calderon*, case no. 97-99030.

On December 21, 2001, this Court denied Cooper's request for authorization to file a second petition for writ of habeas corpus to raise a claim of ineffective assistance of trial counsel based on a failure to investigate and

present evidence regarding an inmate's hearsay claim that another inmate confessed to the Ryen/Hughes murders. *Cooper v. Calderon*, 274 F.3d 1270 (9th Cir. 2001). Cooper's petition for rehearing and rehearing en banc was dismissed as unauthorized by this Court on October 18, 2002. *Cooper v. Calderon*, 308 F.3d 1020 (9th Cir. 2002), *cert. denied*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 1793 (2003). On November 21, 2002, this Court denied Cooper's motion to reconsider or vacate the order denying his motion to stay the mandate pending the filing of a petition for writ of certiorari and request for en banc review regarding the denial of authorization to file a second federal habeas petition. *Cooper v. Calderon*, case no. 98-99023.

On April 18, 2002, Cooper filed his fourth petition for writ of certiorari in the United States Supreme Court in case number 01-10742, which challenged this Court's affirmance of the District Court's denial of Cooper's first federal petition for writ of habeas corpus. *See Cooper*, 255 F.3d 1104. On October 7, 2002, the United States Supreme Court denied the petition. *Cooper v. Calderon*, 537 U.S. 861, 123 S. Ct. 238, 154 L. Ed. 2d 100 (2002).

On February 14, 2003, this Court denied Cooper authorization to file a third federal petition for writ of federal habeas corpus in the District Court. *Cooper v. Calderon*, case no. 99-71430. On April 7, 2003, this Court denied

Cooper's petition for rehearing and rehearing en banc from the denial of authorization to file a third federal petition for writ of habeas corpus.

On February 11, 2003, Cooper filed a petition for writ of habeas corpus in the United States Supreme Court in case number 02-9051, presenting the same underlying claim that was the subject of this Court's denial of authorization to file a second petition for writ of habeas corpus in the District Court. *See Cooper*, 274 F.3d at 1272. The United States Supreme Court denied the petition for writ of habeas corpus on April 21, 2003. *In re Cooper*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 1793 (2003).

On February 20, 2003, Cooper filed a fifth petition for writ of certiorari in the United States Supreme Court in case number 02-9050, regarding this Court's denial of authorization to file a second federal habeas petition in the District Court. On April 21, 2003, the United States Supreme Court denied the petition. *Cooper v. Calderon*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 1793 (2003).

On May 15, 2003, Cooper filed his second petition for writ of habeas corpus in the United States Supreme Court in case number 02-10760. The United States Supreme Court denied the petition on October 6, 2003. *In re Cooper*, \_\_\_ U.S. \_\_\_, 124 S. Ct. 92 (2003).

On June 13, 2003, the San Diego County Superior Court denied Cooper's petition for writ of habeas corpus alleging mental retardation. (*See App. 1.*) On July 2, 2003, following an evidentiary hearing, the San Diego County Superior Court denied Cooper's motions relating to post-conviction DNA testing.

On June 24, 2003, Cooper filed his fifth state petition for writ of habeas corpus in the California Supreme Court claiming that: (1) his execution would violate the Eighth Amendment because he is mentally retarded; and (2) in the alternative, he was entitled to a new sentencing hearing to permit consideration of mitigating evidence of his mental retardation based on the United States Supreme Court's holdings in *Ring v. Arizona*. On October 22, 2003, the California Supreme Court denied the petition. (*In re Cooper*, case no. S116984.)

On July 22, 2003, Cooper filed a petition for writ of mandate in the California Supreme Court, relating to the denial of his post-conviction DNA motion. *Cooper v. Superior Court*, case no. S117675. The California Supreme Court denied the motion on October 22, 2003.

On September 2, 2003, Cooper filed a third motion to recall the remittitur in the California Supreme Court. On October 22, 2003, the California Supreme Court denied the motion. *People v. Cooper*, case no. S004687.

On January 20, 2004, Cooper filed his sixth petition for writ of certiorari in the United States Supreme Court, in case number 03-8513, presenting a *Ring* claim that was the subject of the California Supreme's Court's denial of his fifth state petition for writ of habeas corpus. *Cooper v. California*, case no. 03-8513.

On February 2, 2004, Cooper filed a complaint in the United States District Court for the Northern District of California, pursuant to 42 U.S.C. § 1983, seeking a temporary restraining order, preliminary injunction, and expedited discovery on a claim that California's use of lethal injection violates the Eighth Amendment. On February 5, 2004, Jeremy Fogel, United States District Court Judge, issued an order denying the motions for temporary restraining order, preliminary injection, and expedited discovery.

On February 2, 2004, Cooper filed his sixth petition for writ of habeas corpus and an emergency application for a stay of execution in the California Supreme Court. The petition was denied on the merits on February 6, 2004. *In re Cooper*, case no. S1222389.

On February 5, 2004, Cooper filed a sixth volume of exhibits with the California Supreme Court in support of his sixth state habeas petition after the denial of his petition. On February 6, 2004, the California Supreme Court deemed



the submission a seventh state habeas corpus petition. *In re Cooper*, case no. S122507. An informal response to the petition was filed on February 6, 2004.

On February 6, 2004, Cooper filed the pending application for authorization to file a successive petition for writ of habeas corpus.

### **STATEMENT OF FACTS**

This Court is well acquainted with the facts and circumstances of Cooper's nocturnal massacre in the sanctity of the Ryen home. *See Cooper v. Calderon*, 255 F.3d at 1107; *People v. Cooper*, 53 Cal.3d at 794-802.

## **ARGUMENT**

### **I.**

#### **COOPER'S CLAIMS DO NOT PRESENT A BASIS FOR AUTHORIZATION TO FILE A SUCCESSIVE PETITION**

Cooper seeks to file a third petition for writ of habeas corpus in the District Court raising nine claims: (1) actual innocence; (2) contamination of and tampering with evidence, presentation of misleading and false testimony, and withholding material exculpatory evidence at trial and post-conviction; (3) failure to disclose material exculpatory evidence relating to criminalist Baird, multiple other suspects, and the availability of standard sneakers issued to all prisoners; (4) permitting Josh Ryen's testimony to be presented by a videotaped examination by counsel and an audiotaped session between Josh and his therapist; (5) denial of access to the state courts to pursue further post-conviction DNA testing and post-conviction discovery; (6) destruction of the "bloody" coveralls; (7) ineffective assistance of counsel for failure to present evidence of the third-party confession of Koons; (8) ineffective assistance of counsel for failing to connect the "bloody" coveralls to Lee Furrow, a convicted murderer; and (9) ineffective assistance of trial counsel for failing to present evidence that yellow and brown hairs were found "clutched" in the hands of the victims. Not one of Cooper's nine claims satisfies the requirements for the filing of a successive

petition. The pending application vividly illustrates the need for the gatekeeper role granted this Court by Congress. 28 U.S.C. § 2244(b).

As this Court noted in denying Cooper's first request to file a successive habeas petition:

"AEDPA greatly restricts the power of the federal courts to award relief to state prisoners who file second or successive habeas corpus applications. If the prisoner asserts a claim that he has already presented in a previous federal habeas petition, the claim must be dismissed in all cases. And if the prisoner asserts a claim that was *not* presented in a previous petition, the claim must be dismissed unless it falls within one of two narrow exceptions."

*Cooper v. Calderon*, 274 F.3d at 1273, quoting *Tyler v. Cain*, 533 U.S. 656, 121 S. Ct. 2478, 2481-2482, 150 L. Ed. 2d 632 (2001) (emphasis in original, citation omitted).

If a claim is not subject to denial based on its having been presented before, it still cannot be heard unless Cooper shows that:

(1) it relies on a new rule of constitutional law made retroactive to cases on collateral review by the United States Supreme Court that was previously unavailable; or

(2) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; ***and*** the facts underlying the claim, if proven, and viewed in light of the evidence as a whole would

be sufficient to establish by clear and convincing evidence that but for constitutional error no reasonable factfinder would have found petitioner guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(A)-(B).

Cooper cannot make the necessary showing for authorization to file a successive habeas petition. All of his claims have already been presented to the state and federal courts; at most, his latest casting involves some immaterial shift in emphasis or expression. To the extent that any of his claims actually incorporate new allegations, Cooper cannot demonstrate due diligence in their discovery. Moreover, none of Cooper's claims support a showing by clear and convincing evidence that no factfinder would have found him guilty but for the constitutional error being alleged.

**A. Cooper's Claim One (Assertion of Actual Innocence)**

Cooper's first claim purports to be both a freestanding innocence claim and a general assertion that all of his claims be considered "regardless of their procedural posture" on that account. (*See* Pet. at 15.) In support of claim one, Cooper alleges – four days before his scheduled execution and after 20 years of litigation – that there exist "facts, *among others* to be presented *after adequate funding, discovery*, and access to this Court's process, which support this claim

and affirmatively show Mr. Cooper is *probably innocent*." (Pet. at 15-16, emphasis added.) Cooper is not entitled to be heard regarding a freestanding claim of actual innocence, and he misapprehends the requisite showing that would compel this Court to consider his claims in a successive petition.

Cooper must present his claim of actual innocence in connection with another claim of constitutional error. *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). The suggestion in *Herrera* that a truly persuasive showing of innocence might suffice for habeas relief is premised on the unavailability of any other remedy. Cooper was permitted to make his showing to the Governor of California, as well as to the California Supreme Court, since California law permits a claim of actual innocence to be raised by habeas corpus. That Cooper's request for clemency was denied and his claim of actual innocence rejected by the California Supreme Court affords no basis for permitting him to present that same belated claim at this juncture.

Even if Cooper's freestanding claim of actual innocence were cognizable, it necessarily fails. New evidence of innocence must be reliable evidence not presented at trial. *Schlup v. Delo*, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1985); *Calderon v. Thompson*, 523 U.S. 538, 559, 118 S. Ct. 1489, 1503, 140 L. Ed. 2d 728 (1998). This Court has noted the rarity of such

evidence. *Shumway v. Payne*, 223 F.3d 982, 990 (9th Cir. 2000). Cooper has not presented any reliable evidence of innocence. Moreover, he relies on much of the same arguments and evidence presented by the defense at trial.

Specifically, he argues an absence of motive, as well as evidence of multiple assailants based on the number of weapons used in the attack and Josh Ryen's statements. Defense trial counsel argued an absence of motive from the fact that money and other "valuable things in the Ryen home were not taken or disturbed." (102 RT 7796, 7799.) The statements by Joshua Ryen were fully explored at trial and presented to the jury. *People v. Cooper*, 53 Cal.3d at 800-801. Defense counsel extensively cross-examined Dr. Irving Root, the prosecution's pathologist, concerning the nature of the victims' wounds and their likely source, in an effort to raise the spectre that multiple assailants had been involved. (91 RT 3963 - 92 RT 4147; 92 RT 4161-4169.) Defense counsel also presented expert testimony from John Thornton, a professor of forensic science at the University of California at Berkeley, that by the time of trial it was no longer "feasible" for any expert to determine the number of assailants because of the manner in which the crime scene had been investigated. (105 RT 7509-7510.) The defense then argued this theory to the jury (106 RT 7801-7804), emphasizing the use of multiple weapons (106 RT 7801), the nature of the wounds (106 RT

7802), the possibility that Jessica may have been outside during the attack (106 RT 7803), and Josh's statements (102 RT 7806). Defense counsel also attacked the criminalist who performed the initial forensic testing of the drop of blood (A-41). (102 RT 7776-7777.)

In addition to renewing matters presented to the jury at the time of trial, Cooper claims his innocence is indicated by his allegations that: (1) testimony regarding the uniqueness of the sneakers that had been issued to him at prison was false; (2) law enforcement officers took cigarette butts from the hideout house and planted them in the Ryen station wagon to implicate Cooper; (3) evidence was tampered with before post-conviction DNA testing while a criminalist had earlier checked out that evidence for a 24-hour period; (4) Lee Furrow owned the "bloody" coveralls and was a convicted murderer, and his girlfriend believed he was involved in the Ryen/Hughes murders; (5) the bloody t-shirt was mishandled; and (6) Koon had "confessed." Cooper's allegations fail to establish his innocence.

Moreover, consideration of the totality of the evidence of guilt presented at trial cannot be ignored in considering newly presented evidence of innocence. *Calderon v. Thompson*, 523 U.S. at 565. Cooper, even after more than two decades of trying, simply cannot explain away all of the evidence against him.

Given the evidence presented at trial, Cooper's guilt is not refuted by the claim of innocence he presents to this Court in the eleventh hour. There is no doubt about what Cooper did to an innocent family in the sanctity of their home over 20 years ago. As the California Supreme Court aptly observed regarding the evidence of Cooper's guilt presented at trial:

. . . . Many items of circumstantial evidence pointed to defendant's guilt. Some alone were quite compelling; others less so. In combination, the evidence established defendant's guilt overwhelmingly.

First, there was the fact of defendant's escape and hiding out at the house nearest the crime scene at precisely the time of the crime. Defendant left the house the very night of the murders. The Ryen house could be seen from the Lease house. Since defendant's telephonic appeals for help had proved vain, he desperately needed a means to get out of the area, a means the Ryen station wagon could provide. The hatchet that was one of the murder weapons came from within the Lease house, near the window through which the Ryen house was visible. The sheath for this hatchet was found on the floor of the very room defendant slept in. Items that could have been the remaining murder weapons were missing from the Lease house.

In addition to these circumstances, there was the strong shoe print comparison evidence, the cigarette and tobacco comparison evidence, the match between defendant's blood type and the drop of blood in the Ryen house that was not from a victim, the bloodstained prison issue button on the Lease house floor, the bloodstained rope (not defendant's blood, consistent with a victim's blood) found in the closet of the bedroom defendant used, the blood in the Lease house shower and elsewhere, the hair comparisons, and the other evidence summarized earlier in this opinion.



***It is utterly unreasonable to suppose that by coincidence, some hypothetical real killer chose this night and this locale to kill; that he entered the Lease house just after defendant left to retrieve the murder weapons, leaving the hatchet sheath in the bedroom defendant used; that he returned to the Lease house to shower; that he drove the Ryen station wagon in the same direction defendant used on his way to Mexico; and that he happened to wear prison issue tennis shoes like those of defendant, happened to have defendant's blood type, happened to have hair like defendant's, happened to roll cigarettes with the same distinctive prison issue tobacco, and so forth. Defendant sought to discredit or minimize each of these items of evidence, but the sheer volume and consistency of the evidence is overwhelming. . . .***

*People v. Cooper*, 53 Cal.3d at 836-837, emphasis added.

Further, Cooper sought and obtained post-conviction DNA testing. Pursuant to a joint agreement for DNA testing between Cooper and the State, DNA tests were performed on: (1) a drop of blood located on the hall immediately across from the doorway to the master bedroom where Jessica Ryen lay dead in the doorway; (2) two cigarette butts in the Ryen station wagon (one manufactured/one hand rolled cigarette); (3) the bloody t-shirt found on the road by a bar a few miles from the crime scene; (4) the hatchet; and (5) a prison issued button on the floor of the hideout house. Despite Cooper's insistence that he had never been inside the Ryen home or in the Ryen car, his DNA was detected in the drop of blood, both cigarettes, and (along with the blood of Doug Ryen) on the bloody t-shirt. None of the tests disclosed any DNA

profiles other than Cooper or the victims. As this Court observed in denying Cooper's second application for authorization to file a successive habeas petition:

Contrary to his predictions of exculpation, the DNA test results inculcate Cooper and support his conviction. Cooper has failed to present newly discovered facts establishing his innocence.

*Cooper v. Calderon*, case no. 99-71430, 2/14/03 Order at 2.

Notably, Cooper has never presented any evidence that inculcates anyone else for the Ryen/Hughes murders. Instead, he has simply endeavored to negate the overwhelming evidence of his guilt by attacking everyone involved in the judicial system, i.e. his defense lawyers at every stage of 20 years of litigation, the police, the scientist, the prosecutors, and the state and federal jurists who have repeatedly and conscientiously reviewed and upheld the judgment of his conviction and sentence of death.

To the extent Cooper offers his claim of actual innocence as a basis for demanding that his other eight claims being heard, Cooper must show that the factual predicate for the claim could not have been discovered previously through the exercise of due diligence and that the facts of his claim, if proven, and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable jury would have found him guilty. As discussed below, none of Cooper's complaints and allegations regarding evidence

tampering, false testimony, withheld evidence, presentation of Josh's testimony by means other than live testimony, denial of access to the state courts, absence of mitochondrial DNA testing of the hair in the hands of the victims, destruction of the "bloody" coveralls, and his attorneys' failure to present evidence of the "confession" of Koons or to tie the "bloody" coveralls to Lee Furrow, meets this rigorous standard.

#### **B. Cooper's Claim Two (Assertions of Governmental Misconduct)**

Cooper seeks authorization to pursue a claim that the state has engaged in a "pattern of deception and manipulation of evidence, inept and corrupt practices, and concealing of official misconduct" that began at the time of trial and has continued through the day of his filing the pending application for authorization to file a successive habeas petition. (App. at 26-27.) Cooper concedes that "some aspects" of his second claim have been raised previously in state and federal courts (App. at 27), but apparently believes that by repeating and embellishing them he will be able to avoid his scheduled execution.<sup>1/</sup> He is

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1. Cooper notes that "A-41, though long gone, reappeared in 1998 during post-conviction counsel's review of the evidence in a bag containing Cooper's blood and saliva." (App. at 31.) It is common knowledge that scientific advances permit testing of smaller amounts of substances than was possible at the time of trial in 1983, before the advent of DNA. Accordingly, a sample that was "used up" for purposes of scientific analysis in 1983, may prove adequate for testing in later  
(continued...)

wrong. Cooper cannot show due diligence. Everything Cooper complains about was or could have been raised in his first federal petition, or in any of the numerous amendments and supplements he was permitted to file between 1994 and 1997.

### **C. Cooper's Claim Three (Alleged Failure to Disclose)**

Cooper requests authorization to claim a failure to disclose material exculpatory evidence relating to criminalist Baird, multiple suspects, and the availability of sneakers to prisoners. (App. at 35.) Cooper has already raised his claim regarding Baird in his first federal habeas petition. As the District Court pointed out, the matters Cooper's alleges occurred years after Cooper's trial. 8/25/97 Order at 70. Cooper's allegations about an inmate recanting his testimony from nearly two decades ago concerning what pair of sneakers he issued Cooper and the Warden's recent recollection about the shoes not having been specially designed or prison-manufactured two decades earlier have not been pursued with due diligence. Moreover, by no stretch of the imagination would the information belatedly presented preclude a reasonable factfinder from finding

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1. (...continued)  
years because of the advancements in science. Notably, Cooper's own post-conviction DNA expert, Dr. Blake, has not provided any support for Cooper's myriad of accusations and insinuations regarding the agreed upon post-conviction DNA testing.

Cooper guilty. Cooper also alleges that three Mexican men in the San Bernardino County jail were discussing the Ryen/Hughes murders in 1984, and said the murders were drug related. Cooper's presentation of a rumor from 1984, in a declaration signed on February 1, 2004, does not show due diligence nor would presentation of the rumor itself have foreclosed a reasonable factfinder from convicting Cooper.

**D. Cooper's Claim Four (Coercion of Josh Ryen's Statements)**

Cooper seeks authorization to file a successive habeas petition claiming that Josh Ryen's testimony, which had been presented to the jury by a videotaped examination by counsel and an audiotaped session between Josh and his therapist, was secured by coercion or improper threats. (App. 43-44.) Cooper's utter lack of due diligence in pursuing this claim is readily apparent. Cooper recites no information in support of his claim that has not been known to Cooper since the time of trial. (App. 46-50.) Indeed, because the basis for the claim, such as it is, is apparent from the record of trial proceedings, Cooper could have raised the claim as early as on direct appeal. Certainly, with any degree of diligence, Cooper could have presented this claim to the District Court between the time he filed his first federal habeas petition on August 11, 1994, and he filed his last amendment to the petition on June 20, 1997.

Beyond his complete lack of diligence, Cooper also cannot satisfy the requirement that his claim, if true, would show by clear and convincing evidence that no factfinder would have found him guilty. Josh Ryen was an eight-year-old child who awoke to his mother's screams, and shortly thereafter, was attacked with a hatchet and a knife. He lay on the floor with his throat slit, next to his dead mother who was naked and covered in blood, for 11 hours. His statements reflected the reality of a young child experiencing a horrific experience. Cooper does not explain how his conviction rests on Josh's statements, let alone how those statements are the result of coercion or how they served to deny him due process. Cooper fully exploited Josh's lack of recollection and statements at trial, and in numerous post-conviction filings. It cannot be said that a factfinder could not find Cooper guilty but for the presentation of Josh's testimony by videotape or the means by which police and his therapist questioned him.

**E. Cooper's Claim Five (Access to State Courts)**

Cooper seeks authorization to file a successive petition in order to claim that his due process rights were denied when, on January 23, 2004, the San Diego County Superior Court rejected for filing his habeas petition and motions for post-conviction discovery and additional DNA testing. (App. at 51-56.) Obviously, Cooper's complaints about these events have not been raised in the

federal courts before, and certainly could not have been known before they transpired less than two weeks ago.

Cooper, however, fails to state a cognizable federal habeas claim. It is certainly not a denial of any federal constitutional right for a lower state court to direct a condemned inmate to file his eleventh-hour challenges in a capital case in the California Supreme Court. The directive was entirely reasonable since Cooper was adding an unnecessary layer of review regarding his last-minute petition and motions with his execution date only a little over two weeks away.<sup>2/</sup>

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2. Indeed, the San Diego Superior County Court made it clear that its ruling was driven at least in part by the time-constraints imposed by the impending execution date. Cooper nevertheless delayed 9 days in bringing his papers to the California Supreme Court after being directed there by the lower court. Moreover, after filing his sixth state habeas petition on Monday, February 2, 2004, Cooper failed to provide all of the volumes of exhibits to support the petition, and continued to file an additional volume each day thereafter until the California Supreme Court denied his petition on Thursday, February 4. Then, yet an additional volume of exhibits was submitted to the court at the end of the day on Thursday, shortly after the court denied the petition.

Cooper's dilatory conduct confirms the validity of the lower state court's concern over preventing delay, and the attendant pressure such delay would present on the courts as Cooper brought his claims into the federal courts. Clearly, his pending application in this Court could have been filed before the evening of February 6, 2004, if only Cooper had presented his requests to the California Supreme Court in the first instance on January 23, 2003, instead of needlessly pursuing relief in the lower court, which had already denied relief on substantially similar grounds.

Cooper's request also necessarily fails because he cannot conceivably show that but for this purported constitutional violation no reasonable factfinder would have found him guilty. Even if the Superior Court had accepted Cooper's habeas petition and motions, no further testing would have been ordered. Indeed, the San Diego County Superior Court had already denied Cooper's request for mitochondrial DNA testing of the hair, and Cooper's effort to have the California Supreme Court overturn that ruling was rejected.

Cooper appears to suggest that the San Diego County Superior Court's directive that he file his eleventh-hour petition and motions in the California Supreme Court in the first instance affords him some basis to demand yet again that mitochondrial DNA testing be conducted on hair evidence. The argument fails. Cooper already sought authorization from this Court to file a successive petition relating to DNA testing of the hair evidence in case number 99-71430. Moreover, the District Court denied Cooper's two requests for funding for DNA testing to prove his "factual innocence." *See* Resp. Opp. to Auth. to File Successive Pet., Exs. C, D, E, case no. 99-71430.

Moreover, even accepting the dubious assumption that mitochondrial DNA testing of the hair in the hands of the victims would have ordered, the result of such testing would not preclude a reasonable factfinder from finding Cooper



guilty. Mitochondrial DNA testing of the hair in the hands of the victims would not yield any probative or material evidence bearing on Cooper's claim of innocence.

The hairs were not "clutched" in the victims' hands. The hairs, covered with the victims' blood, were found lying on the victims' hands, which, because of rigor mortis, had assumed claw-like shapes. Furthermore, only three of the one thousand hairs found on the victims' hands had roots, as one would expect hairs torn from someone's head to have. The hairs were therefore cut, and in fact are consistent with the victims' own hair, cut from their heads during the hatchet attack. The defense hair expert checked out the evidence and analyzed it prior to trial. His notes were obtained by the Attorney General in discovery in relation to Cooper's claims of ineffective assistance of counsel raised in his federal habeas petition. His handwritten notes indicated that none of the human hairs was inconsistent with having come from the victims.

Further, mitochondrial DNA testing is less discriminatory than nuclear DNA testing, and testing of the hair would not provide useful results. The Ryens raised horses and had pets, and their carpet was dirty. Criminalist Steve Myers testified that the possible donors who could have shed hair in the home would be quite large, and the hair could have been deposited up to two to three months prior

to the crimes. (54 RT 4613-4614.) Cooper's own post-conviction DNA expert, Dr. Edward Blake, identified the most relevant biological evidence in this case as being contained within the blood and cigarette butt evidence described above. That evidence has already been tested, and it further inculpated Cooper. For these reasons, Cooper's demand for further post-conviction DNA testing would not yield any evidence that could possibly preclude a reasonable trier of fact from finding Cooper guilty.

**F. Cooper's Claim Six (Alleged Withholding Report About Destruction of the "Bloody" Coveralls)**

Since well before trial, Cooper has repeatedly raised claims relating to the "bloody" coveralls destroyed by the Sheriff's Department. Cooper presented evidence of the destruction of the "bloody" coveralls in pretrial proceedings, and again in front of the jury at trial. (42 RT 3183-3184, 3205, 3211 [pretrial]; 102 RT 6545-6555 [trial].) Cooper complains that an investigation report, never presented at trial, would have shown that Deputy Eckley had destroyed the coveralls only after first obtaining supervisory approval. (App. at 60.) Cooper admits the report that he relies on for this claim was discovered by the defense in 1998, and the "significance" of it was appreciated by the defense investigator.

(App. at 60.) The circumstances of its delayed presentation here do not warrant consideration at this juncture.

The District Court expressly determined that the coveralls had no evidentiary value to Cooper's case because they were received from a woman who had told others that she and other witches believed the coveralls were connected to the Cooper case based on a vision they received during a trance of coveralls which had red splatters on them below the knee. 8/25/97 Order at 51, case no. 92-CV-427-H. Even if Cooper had been diligent, he would be unable to show by clear and convincing evidence that no reasonable factfinder would have found him guilty if they had been aware of "initials" indicating someone at reviewed the request to destroy the coveralls.

**G. Claim Seven (Ineffective Assistance of Counsel *Re* Koons' "Confession")**

Cooper seeks authorization to pursue a claim of ineffective assistance of defense trial counsel based on his failure to present Koon's "confession" to the jury. (App. at 62-66.) Apparently oblivious to the requirements that a claim that has previously been presented must be denied and that even a new claim be presented with due diligence, Cooper notes:

Information surrounding the third-party confession was presented to the California Supreme Court and denied in November of 1997, and twice in the District Court. The lengthy history of this claim has been recounted in numerous pleadings and two opinions by this Court. *Cooper v. Calderon*, 308 F.3d 1020 (9th Cir.2002), both of which denied Cooper's application to file it as a successor claim.

(App. at 66-67.)

As Cooper adequately documents, he is not entitled to continue to pursue the Koon "confession" four days before his scheduled execution, particularly when this Court already denied his authorization to bring precisely the same factual and legal basis in 2001. *Cooper v. Calderon*, 274 F.3d at 1273.

**H. Claim Eight (Ineffective Assistance of Counsel for Not Tying Lee Furrow to the "Bloody Coveralls")**

Cooper seeks authorization to file a successive petition to claim ineffective assistance of counsel for failing to point out to the jury that the "bloody" coveralls were owned by convicted murderer Lee Furrow. (App. 67-68.) As Cooper points out, he already requested authorization from this Court in 1999 to bring his claim, and that request was denied. He offers nothing that would cause this Court to reach a contrary conclusion four days before his scheduled execution.

**I. Claim Nine (Ineffective Assistance of Counsel for Failing to Present Evidence the Victims Were "Clutching" Yellow and Brown Hairs)**

Cooper requests authorization to pursue a claim of ineffective assistance of counsel based on failure to present evidence to the jury that the victims were "clutching" yellow and brown hairs. (App. at 68.) Cooper readily acknowledges that he has already presented the precise legal issue and factual basis to this Court in an earlier request to file a successive habeas petition. (App. at 69, citing 2/14/03 Order, case no. 99-81430.) Cooper offers this Court no basis for ruling differently on this occasion.

## CONCLUSION

For the reasons detailed herein, Respondent respectfully requests this Court deny the application for authorization to file a successive petition and request for stay of execution.

Dated: February 7, 2004.

Respectfully submitted,

BILL LOCKYER  
Attorney General of the State of California

ROBERT R. ANDERSON  
Chief Assistant Attorney General

DANE GILLETTE  
Senior Assistant Attorney General

RONALD MATTHIAS  
Supervising Deputy Attorney General

ADRIANNE S. DENAULT  
Deputy Attorney General

A handwritten signature in black ink, appearing to read 'Holly D. Wilkens', with a long horizontal flourish extending to the right.

HOLLY D. WILKENS  
Deputy Attorney General

*Attorneys for Respondent*

HDW:sm  
00002217SD2003XX0001

## DECLARATION OF SERVICE BY COURIER, E-MAIL, & U.S. MAIL

I declare that I am employed in the County of San Diego, California; that I am over 18 years of age and am not a party to the within-entitled cause; that my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, California 92186-5266, and that on **February 7, 2004**, I served the attached

<b>RESPONDENT'S OPPOSITION TO APPLICATION FOR AUTHORIZATION TO FILE SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS AND REQUEST FOR STAY OF EXECUTION</b>	<b><i>Cooper v. Woodford</i> U.S. Court of Appeals for the Ninth Circuit Case No. 04-70578 <b>CAPITAL CASE</b></b>
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by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid with the United Parcel Service ("UPS"), addressed as follows:

\*DAVID T ALEXANDER  
ORRICK HERRINGTON & SUTCLIFFE LLP  
OLD FEDERAL RESERVE BANK BLDG  
400 SANSOME ST  
SAN FRANCISCO CA 94111-3143

\*ROBERT B AMIDON  
ATTORNEY AT LAW  
2550 N HOLLYWOOD WY STE 502  
BURBANK CA 91505-1055

and, in addition, sent by e-mail the same complete document to the above-named addressees indicated with an asterisk before their name;

and by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General, for deposit in the United States Postal Service that same day in the ordinary course of business, addressed as follows:

WILLIAM M McGUIGAN  
ATTORNEY AT LAW  
815 THIRD AVE STE 306  
CHULA VISTA CA 91911

HON JEREMY FOGEL  
U S DISTRICT JUDGE  
280 S FIRST ST NO 2112  
SAN JOSE CA 95113-3008

RICHARD B MAZER  
ATTORNEY AT LAW  
99 DIVISADERO ST  
SAN FRANCISCO CA 94117-3210

HON MARILYN L HUFF  
CHIEF U S DISTRICT JUDGE  
880 FRONT ST RM 4290  
SAN DIEGO CA 92101-8900

HON WILLIAM K SUTER CLERK  
UNITED STATES SUPREME COURT  
1 FIRST ST N E  
WASHINGTON DC 20543

MARY JAMESON  
CASE COORDINATOR  
CALIFORNIA SUPREME COURT  
350 MCALLISTER ST  
SAN FRANCISCO CA 94102-3600

HON WILLIAM H KENNEDY  
JUDGE DEPT 54  
SAN DIEGO CO SUPERIOR COURT  
220 W BROADWAY  
SAN DIEGO CA 92101-3409

JOHN P KOCHIS  
CHIEF DEPUTY DISTRICT ATTORNEY  
COUNTY OF SAN BERNARDINO  
316 N MOUNTAIN VIEW AVE  
SAN BERNARDINO CA 92415-0004

PETER J SIGGINS  
LEGAL AFFAIRS SECRETARY  
OFFICE OF THE GOVERNOR  
STATE CAPITOL FIRST FLOOR  
SACRAMENTO CA 95814

MICHAEL G MILLMAN  
EXECUTIVE DIRECTOR  
CALIFORNIA APPELLATE PROJECT  
101 SECOND ST STE 600  
SAN FRANCISCO CA 94105

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Diego, California, on **February 7, 2004**.

STEPHEN MCGEE

Typed Name

  
Signature

00002217SD2003XX0001